

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 8, 2008

David R. Schanker
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2007AP1486

STATE OF WISCONSIN

Cir. Ct. Nos. 2004FA488
2005FA135

**IN COURT OF APPEALS
DISTRICT III**

IN RE THE MARRIAGE OF:

DAWN K. WILLSON,

PETITIONER-RESPONDENT,

V.

ALEX J. WILLSON,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Eau Claire County:
BENJAMIN D. PROCTOR, Judge. *Reversed and cause remanded with
directions.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Alex Willson appeals an ex parte order.¹ The ex parte order vacated an earlier order requiring Dawn Willson to return the parties' daughter Raquel to Alex. Alex argues, among other things, that the court erred in vacating the order without notice to him as required by WIS. STAT. § 801.14.² We agree, reverse, and remand with directions to vacate the ex parte order.

BACKGROUND

¶2 In March 2005, Alex filed a petition seeking an order requiring Dawn to return Raquel to him. According to Alex's petition, the parties married in 2001 in California.³ Raquel was born in California in 2001. The parties and Raquel lived primarily in Spain from November 2003 through September 2004, when Dawn returned to the United States with Raquel. Alex's petition alleged that when Dawn returned to the United States with Raquel she violated the Hague Convention on the Civil Aspects of International Child Abduction (the Convention) and federal statutes governing international child abduction. He attached an order from a Spanish court granting him guardianship and custody of Raquel.

¶3 In June 2005, the circuit court held an evidentiary hearing on whether the United States or Spain had the authority to resolve the dispute under the Convention. The court issued an order June 2, 2005, concluding Spain was the

¹ Alex also appeals a second order denying his motion to vacate the ex parte order.

² All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

³ Alex is a British citizen. Dawn is a United States citizen.

proper forum under the Convention, and ordering Dawn to allow Alex to return to Spain with Raquel. The Spanish court ultimately granted Alex custody of Raquel and set a placement schedule under which Raquel would spend most of her time in Spain with Alex but would travel to the United States for holiday visits with Dawn.

¶4 In March 2007, Dawn filed a pro se “emergency motion for nunc pro tunc order to vacate.” The motion was accompanied by a letter from Dawn stating that California had jurisdiction over the case, and Wisconsin never had jurisdiction. Dawn attached documents showing she filed for divorce in California in June 2004. She also attached a March 2007 order from the California court stating the court was accepting the divorce filing and Dawn would have until April 2007 to serve Alex.

¶5 The circuit court granted Dawn’s emergency motion without a hearing. It vacated the June 2, 2005 order and dismissed the Wisconsin proceeding. Neither Alex nor his Wisconsin counsel were given notice of the motion when it was made. The court mailed a copy of the ex parte order to Alex’s address in Spain after it was entered, but the letter was returned as undeliverable.

¶6 The following month, Alex filed a motion requesting the court vacate the ex parte order. The motion was accompanied by an affidavit stating Alex first received notice of the ex parte order after it was entered, and he had yet to be served with a copy of any pleading or the ex parte order. The affidavit also stated Alex had never been served with any of the pleadings in the California action, and Dawn had not advised the California court of the existence of the Spanish court order. The court denied Alex’s motion without a hearing.

DISCUSSION

¶7 In this appeal, Alex challenges the ex parte order on both procedural and substantive grounds. He argues the procedure followed by the court was contrary to WIS. STAT. § 801.14 and his due process rights. He also argues the court's conclusion that it lacked jurisdiction was incorrect on the merits.

¶8 We conclude the procedure followed by the court was contrary to WIS. STAT. § 801.14, and as a result the ex parte order must be reversed. We therefore need not reach Alex's other arguments. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663 (1938) (only dispositive issues need be addressed).

¶9 The meaning of a statute and its application to undisputed facts are questions of law reviewed without deference. *Progressive Cas. Ins. Co. v. Bauer*, 2007 WI App 122, ¶5, 301 Wis. 2d 491, 731 N.W.2d 378. WISCONSIN STAT. § 801.14(1) provides that "every written motion other than one which may be heard ex parte ... shall be served upon each of the parties." A written motion must be accompanied by notice of the hearing, and both must be served "not later than 5 days before the time specified for the hearing" unless a statute or court order states otherwise. WIS. STAT. § 801.15(4). "All written motions shall be heard on notice unless a statute or rule permits the motion to be heard ex parte." *Id.*

¶10 Motions to vacate are governed by WIS. STAT. § 807.03:

An order made out of court without notice may be vacated or modified without notice by the judge who made it. An order made upon notice *shall not be modified or vacated except by the court upon notice*, but the presiding judge may suspend the order, in whole or in part, during the pendency of a motion to the court to modify or vacate the order. [Emphasis added].

This statute allows ex parte motions to vacate only when the order to be vacated was not entered on notice. Here, the June 2, 2005 order was made on notice, after a contested hearing. It therefore could not be vacated “except by the court upon notice.” *See id.* That procedure was not followed here.

¶11 Dawn does not challenge Alex’s reading of these statutes. Instead, she argues they do not apply here because her motion was based on the court’s subject matter jurisdiction. She points out that under WIS. STAT. § 802.06, a court must dismiss an action if “it appears by motion of the parties or otherwise” that the court lacks subject matter jurisdiction. WIS. STAT. § 802.06(8)(c). This includes the power to dismiss for lack of subject matter jurisdiction on the court’s own motion. *Actor v. Pewaukee Lake Sanitary Dist.*, 88 Wis. 2d 658, 663-64, 277 N.W.2d 778 (1979). Dawn argues as a practical matter the court could have decided the jurisdictional question on its own motion, and it should not make any difference that “one of the parties brought the matter to the court’s attention.”

¶12 We reject this argument, for several reasons. First, the court’s order was not entered on the court’s own motion; it was entered after Dawn made a motion and submitted new evidence to the court, along with argument that there was no subject matter jurisdiction because of the new evidence. Nothing in WIS. STAT. § 802.06 states that motions under that section may be brought ex parte. Rather, those motions must be brought on notice and with a hearing under WIS. STAT. §§ 801.14(1) and 801.15(4). We decline to treat Dawn’s motion as anything other than what it was: a motion brought without notice or a hearing, contrary to §§ 801.14(1) and 801.15(4).

¶13 Second, Dawn’s argument confuses the power to raise an issue on the court’s own motion with a power to decide its own motion without notice.

When the circuit court raises an issue on its own motion, the court must still give the parties notice and an opportunity to be heard. *Larry v. Harris*, 2007 WI App 132, ¶21, 301 Wis. 2d 243, 733 N.W.2d 911, *review granted*, 2007 WI 134, 305 Wis. 2d 126, 742 N.W.2d 524; *see also State v. Holmes*, 106 Wis. 2d 31, 40-41, 315 N.W.2d 703 (1982). This avoids or reduces any unfairness to counsel and any appearance that the court is “usurping the function of counsel.” *Holmes*, 106 Wis. 2d at 40-41. Even analyzing the motion here as if it were the court’s own motion, the court erred in vacating the June 2, 2005 order without notice and a hearing.

¶14 Dawn argues Alex had notice and a hearing because he was able to file his own motion to vacate. She relies on *Larry*, where the court vacated a default judgment on its own motion, without prior notice to the parties. *Larry*, 301 Wis. 2d 243, ¶9. Larry moved for reconsideration, and the court set a briefing schedule. *Id.*, ¶¶10-11. After briefing, the court denied Larry’s motion. We affirmed:

After Larry learned of the court’s intended action, she had an opportunity to be heard ... in the context of a briefing schedule on her motion to reconsider that covered several weeks. Under these circumstances, Larry had a full opportunity to apprise the trial court of all facts and law which supported her view that the court could not, or should not, rescind the previously entered default judgment against [the defendant].

Id., ¶22.

¶15 The same cannot be said here. When Alex filed his motion to vacate after learning of the ex parte order, the court denied his motion without a hearing. It did not order a briefing schedule or hearing on the merits of the jurisdictional dispute. Under these circumstances, Alex did not receive a “full opportunity to

apprise the trial court of all facts and law” suggesting Dawn’s motion should be denied. *See id.*

¶16 An order issued on a motion that does not comply with WIS. STAT. § 801.14 is void. *Stein v. Illinois State Assistance Comm’n*, 194 Wis. 2d 775, 783, 535 N.W.2d 101 (Ct. App. 1995).⁴ Dawn argues this remedy does not apply here because her motion was jurisdictional. However, as established above, Dawn’s jurisdictional motion under WIS. STAT. § 802.06 was subject to WIS. STAT. §§ 801.14(1) and 801.15(4) in the same way as any other motion. Because the ex parte order was entered on a motion that did not conform to § 801.14, it is void. *See Stein*, 194 Wis. 2d at 783. On remand the court shall vacate the March 2007 ex parte order that vacated the June 2, 2005 order.

By the Court.—Orders reversed and cause remanded with directions.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

⁴ Dawn argues *Stein* is distinguishable because our decision was based in part on different statutes. However, in *Stein*, we held that the plaintiff had failed to comply with WIS. STAT. §§ 801.11 and 801.14 and “In the absence of compliance with those statutes the judgment is void and, therefore, must be set aside.” *Stein v. Illinois State Assistance Comm’n*, 194 Wis. 2d 775, 783, 535 N.W.2d 101 (Ct. App. 1995).

